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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 13 2007

SRC 05 264 50280

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a flow assurance analyst. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief. For the reasons discussed below, the petitioner has not overcome the director's concerns.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The beneficiary holds Master's degrees in Chemical Engineering and Petroleum Engineering from the Indian Institute of Technology, Kanpur and Texas A&M University. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the beneficiary works in an area of intrinsic merit, flow assurance, and that the proposed benefits of his work, more efficient oil recovery from deep water offshore oil rigs, would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In response to the director's request for additional evidence, counsel stated: "It is [the beneficiary's] advanced education and the totality of his experience working in the various areas culminating in flow assurance for 13 years which makes this specialist an expert." [redacted] Human Resources Manager for the petitioning company, asserts that the Department of Labor would not allow the

petitioner to limit the job to individuals with the beneficiary's experience and education. On appeal, counsel states:

> Petroleum Engineering topped the list of projected scarce skills with 77% of the companies listing that profession as a major concern. [Reference to exhibit omitted.] The Oil and Gas industry faces [a] key-worker shortage. With few traditional sources of workers available, executive are forced to find new ways to recruit, develop and retain key skilled employees. [Reference to exhibit omitted.]
>
> Due to the shortage of U.S. workers the Oil and Gas industry currently faces, a waiver of the job offer and thus of the labor certification process in [the beneficiary's] case would be in the national interest.

Matter of New York State Dep't. of Transp., 22 I&N Dec. at 221, specifically rejects these contentions. When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. *Id.* at 220. The assertion of a labor shortage, therefore, should be tested through the labor certification process. *Id.* The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* Finally, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the alien employment certification process. *Id.* at 223.

Even if we were to conclude that the alien employment certification process was inapplicable in this matter, the inapplicability or unavailability of an alien employment certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this beneficiary's contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver, over and above the visa

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Page 5

classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate the alien's past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the beneficiary's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

In 1990, the beneficiary received his Master's degree from the Indian Institute of Technology, Kanpur. He then worked as a project engineer for the Oil and Natural Gas Corporation in Mumbai through August 2000. In 2002, the beneficiary received his Master's degree from Texas A&M University. He then worked briefly as a senior process engineer for Granherne, KBR – Halliburton before accepting his current position as a flow assurance analyst with the petitioning company. [redacted] Peterson Chair in Petroleum Engineering at Texas A&M University, asserts that the beneficiary is also enrolled in the distance education program at Texas A&M University seeking his Ph.D.

While most of the evidence relates to the beneficiary's research and work in the United States, we acknowledge that the petitioner submitted evidence that the beneficiary received cash awards and certificates of recognition and merit from his employer in India. Recognition for achievements is one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting one criterion, or even the requisite three criteria for that classification warrants a waiver of the alien employment certification in the national interest.

[redacted], a member of the National Academy of Engineering, asserts that Texas A&M University aggressively recruited the beneficiary, one of the few international students awarded admission and a research assistantship. [redacted] asserts that, while a student, the beneficiary worked on a U.S. Minerals Management Services (MMS) funded project, completing a report now available on their website. The beneficiary also presented his findings, winning a student paper award for the work. The beneficiary also published and presented peer-reviewed papers. [redacted] notes that the beneficiary has been "nominated to the Minerals, Metals and Materials Society (TMS)." [redacted] asserts that as a member of the society, the beneficiary will be part of the OTC 2006 Flow Assurance Task Force for selecting abstracts for technical sessions. In response to the director's request for additional evidence, the petitioner submitted a list of abstracts reviewed by the beneficiary.

[redacted] an independent consultant in the industry, asserts that, through his association with the task force, he knows the beneficiary. [redacted] affirms that members of the 2006 task force are "people with internationally-recognized, outstanding research / pioneering work that has impacted the field of Flow Assurance." [redacted] states that the beneficiary demonstrated his "credentials" through his publications. The regulation at 8 C.F.R. § 103.2(b)(2) permits a petitioner to rely on affidavits only after showing that primary and secondary evidence is unavailable or does not exist. Affidavits should be from individuals with "direct personal knowledge of the event."

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In support of the statements about the OTC "task force," the petitioner submitted the list of participants for the TMS/OTC "subcommittee." No official evidence, such as TMS' bylaws, was submitted to corroborate the implication that the members of the subcommittee are part of an exclusive "task force." [redacted] is not included on the list of members provided by the petitioner. He does not indicate that he was responsible for selecting the members or explain how he has first hand knowledge of the selection process. Moreover, the beneficiary did not serve as a member of this task force or review abstracts until after the filing of the petition. The petitioner must establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, we cannot consider these review responsibilities or OTC subcommittee membership.

[redacted], the beneficiary's immediate supervisor at the petitioning company, asserts that the beneficiary has worked on projects for Shell, British Petroleum (BP), Exxon, Chevron and independent companies. The beneficiary authored papers highlighting the flow assurance analysis performed for a deepwater field and discussing an emerging technology for high-pressure deepwater fields. The beneficiary "developed a novel gas-lift assisted blowdown procedure to mitigate hydrates." [redacted] asserts that the petitioner filed a patent disclosure for this procedure and the patent application, listing the beneficiary and [redacted] as co-inventors, is in the record.

The final letter is from [redacted] The director concluded that, as a human resources manager, she was not qualified to explain the significance of the beneficiary's engineering accomplishments. Counsel does not dispute this conclusion on appeal and we concur with the director.

An alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. Similarly, we will not presume the beneficiary's influence from the reputation of the journals that published his articles. The petitioner must demonstrate the influence of the individual articles.

Letters containing mere assertions of industry interest and a positive response in the field are less persuasive than letters that provide specific examples of how the beneficiary has influenced the field.

In addition, letters from independent references who were previously aware of the beneficiary through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the beneficiary and are merely responding to a solicitation to review the beneficiary's curriculum vitae and work and provide an opinion based solely on this review.

The record lacks evidence that the beneficiary's articles have been widely cited, letters from independent members of the oil industry affirming the beneficiary's influence beyond his employers or letters from the petitioner's clients affirming the significance of the beneficiary's work beyond the typical improvements to engineering inherent within the field.

The record shows that the beneficiary is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research pursued by industry must present some benefit to the employer and its clients. It does not follow that every researcher working for a company with distinguished clients inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.